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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 809

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington corporation, OREGON TRUNK RAILWAY, a Washington corporation, and OREGON ELECTRIC RAILWAY COMPANY, an Oregon corporation,
Petitioners

v.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, a voluntary unincorporated association, T. M. DELANEY, individually and as General Chairman, LEO HOLZACHUH, EARL A. JONES, E. O. BUDAHL, and M. H. MEISTRELL, individually and as Local Chairmen,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner is the Spokane, Portland and Seattle Railway Company and affiliates. The respondents are the duly certified collective bargaining representatives of road conductors and brakemen employed by petitioner.

QUESTIONS PRESENTED

The respondents submit that the questions submitted by petitioner should be stated as follows:

1. Whether the petitioner, having declined to invoke the mediatory services of the National Mediation Board and having urged the Board to reject the respondent's application, was entitled to enjoin a strike called more than 10 days after termination of conferences in view of the provisions of Section 6 of the Railway Labor Act (45 U.S.C., Section 156) and Section 8 of the Norris-LaGuardia Act (29 U.S.C.A., Section 108).

2. Whether the Court of Appeals correctly held that a major dispute was involved as defined in the Railway Labor Act and the decision of this court in *Elgin, Joliet & Eastern Ry. Co. v. Burley,* 325 U.S. 711.

STATUTES INVOLVED

The statutes involved are the Railway Labor Act, 45 U.S.C., Section 151, *et seq.* and the Norris-LaGuardia Act, 29 U.S.C., Section 101, *et seq.*

STATEMENT OF THE CASE

The petitioner's statement of the case is argumentative rather than factual. The Court of Appeals correctly stated the facts upon evidence which was all documentary.

On June 25, 1964, the respondent labor organization, Order of Railway Conductors and Brakemen, and four other labor organizations representing operating employees, entered into an agreement with most of the major railroads in the United States, including

petitioner, disposing of issues which had been left to negotiation by the terms of Public Law 88-108 (45 U.S.C., Section 157). Article VIII of the agreement provided in part as follows (R. 44)[1]:

> "This agreement shall be construed as a separate agreement by and on behalf of each carrier party hereto and those employees represented respectively by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, as heretofore stated; and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended."

Article I, Section 2, of the Agreement of June 25, 1964, left certain issues for negotiation on the individual railroads. It provided that under certain circumstances the railroad would provide "suitable lodging at the carrier's expense or an equitable allowance in lieu thereof" at the away-from-home terminal and further provided (R. 44):

> "Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis."

Counsel for the petitioner in his opening statement in the District Court recognized that the quoted sentence contemplated that each carrier would negotiate on a local basis an agreement specifying the lodging

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[1] The record in the court below, excluding original exhibits, has been certified to this court in two volumes. Record references in this brief are to Volume I unless otherwise indicated. The respondent has also requested the clerk of the Court of Appeals to certify Respondents' Exhibits 1 and 2, set forth in full in the Appendix to this brief, to this court.

to be furnished or the dollars and cents to be paid instead. Petitioner's counsel stated (R. Vol. II at Tr. p. 8):

> "Obviously, when any matter of that kind is being settled on a national basis, it isn't possible to dictate what is going to be suitable lodging or an equitable allowance in lieu thereof. So the agreement entered into at the Whitehouse's compulsion also provided that this—what was suitable lodging or an equitable allowance in lieu thereof should go back to the various carriers and the organizations for negotiation."

After the parties failed to reach an agreement in conferences the petitioner, on July 24, 1964, served its "Circular No. 65" on respondents in which it unilaterally designated certain hotels and rooming houses at which it would furnish lodging, with the further pronouncement that it would pay an allowance of $1.50 in lieu of lodging at the places named by it (R. 16).

On August 3, 1964, the respondents served petitioner with the following notice (R. 21)[2]:

> "Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:
>
> (1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpented floors and closet or large locker storage space. Room

[2] Served pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. 156 and usually referred to as a "Section 6 notice".

is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodgings and points of reporting for duty or going off duty. Call service will be provided by carrier."

(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars ($6.00) to be paid by check separate and apart from wages and earnings.

Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act."

Subsequent conferences failed to produce an agreement. On November 12, 1964, the respondent ORCB applied for the services of the National Mediation Board (R. 8). The National Mediation Board requested petitioner's comments regarding the "organization's Section 6 notice of August 3, 1964 requesting adoption of certain rules governing lodging facilities" (R. 8, 18).[3] In reply the petitioner urged the Mediation Board "to reject the organization's application for its mediatory services" (R. 8, 18-20). The petitioner

[3] The National Mediation Board has ruled that notices identical to that in the case at bar "are proper notices served in accordance with Section 6 of the Railway Labor Act" (Defendant's Exhibits 1 and 2 set forth in full in the Appendix to this brief).

itself did not apply for mediatory services. The last conference between the parties was held on January 27, 1965 (R. 113).

On June 3, 1965, the respondent notified the National Mediation Board, and the Board in turn wired petitioner, that respondent would authorize a withdrawal from service on June 7, 1965, in support of its Section 6 notice of August 3, 1964 (R. 23). The National Mediation Board requested the petitioner to "advise return wire subject this dispute and present status" (R. 23). The petitioner made no response to the Board's request. Instead, on June 3, 1965, the petitioner filed an ex parte submission with SP&S-ORCB Special Board No. 434 on the following claim (R. 9, 22):

> "That the arrangements made by the Management of the Spokane, Portland and Seattle Railway Company as described in Superintendent's Circular No. 65, dated July 24, 1964, effectively discharge this Carrier's obligation under Section 1, Article II, 'Expenses Away from Home,' of the National June 25, 1964 Agreement between the railroads of the nation generally and the operating labor organizations."

On June 4, 1965, the petitioner filed a complaint for injunction (R. 1) and on the same date, without notice to respondents, petitioner obtained a temporary restraining order enjoining the respondent from striking (R. 31-34).

On July 3, 1965, during the hearing on the temporary restraining order, the trial court expressed doubt as to the jurisdiction of the Special Board to determine the claim which petitioner had submitted to it (R. Vol. II, Tr. p. 50-56). Thereupon petitioner filed

an ex parte submission to the National Railroad Adjustment Board in which petitioner reasserted the same claim, that is, that its Circular No. 65 discharged its obligations in respect to the lodging provisions of Article II of the June 25, 1964 agreement (R. 54-98).

The trial court entered a temporary injunction on the ground that only a "minor" dispute was involved (R. 115). The Court of Appeals reversed on the ground that respondent's Section 6 notice proposing a new agreement presented a major dispute and that the trial court lacked jurisdiction to enjoin the strike by reason of the provisions of the Norris-LaGuardia Act (R. 136).

REASONS FOR DENYING THE WRIT

The questions sought to be reviewed do not meet the standards indicated in this court's Rule 19. Petitioner has shown no special or important reasons for the exercise of this court's discretion to review on writ of certiorari.

ARGUMENT

I

In Part I of its petition the petitioner argues that, assuming a major dispute is involved, this court should allow its petition "for the purpose of remanding this case to the court below with a direction that the parties be required to exhaust the mediatory procedures of the Railway Labor Act." (Page 9 of Petition for Certiorari)

This suggestion is advanced by a petitioner who has had more than two years in which to invoke the mediatory services of the National Mediation Board but declined to do so. The petitioner not only did not re-

quest mediation but in fact urged the National Mediation Board to "reject" the respondent's request for mediatory services. (R. 8, 18-20).

Section 8 of the Norris-LaGuardia Act (29 U.S.C., Sec. 108) specifically prohibits injunctive relief to any complainant who has "failed to make every reasonable effort to settle any such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration." This provision is surely applicable to preclude injunctive relief to a petitioner who not only declined to invoke mediation itself but also affirmatively urged the Mediation Board to reject the respondent's application. *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R. Co.*; 321 U.S. 50.

We submit that the petitioner's long-delayed interest in mediation presents no question of importance in the administration of the Railway Labor Act such as would justify the attention of this court.

II

In Division II the petitioner argues that a "major dispute" is not involved in this case as defined by this court in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711.

The petitioner's argument confuses the well-settled distinction between major and minor disputes drawn by this court in the *Burley* case. "Major" disputes are disputes over the formation of collective bargaining agreements or efforts to alter them. They involve the acquisition of rights for the future. "Minor" disputes, on the other hand, involve the meaning or proper application of an existing agreement to a specific situation, generally involving only one employee. A "minor" dispute involves a claim to rights accrued, not the cre-

ation of new rights for the future. *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 723; *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 33; *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330.

The parties to the agreement of June 25, 1964, incorporated the procedures or the Railway Labor Act into their agreement by reference. Article VII of the Agreement incorporates Section 3 of the Railway Labor Act relative to resolution of minor disputes concerning the interpretation or application of the existing Agreement. It contains nothing regarding the making of a new contract for the future. Article VIII of the Agreement incorporated the provisions of the Railway Labor Act as to major disputes relating to future changes or modifications.

The determination of a dispute as to the interpretation of the existing agreement, or a "minor dispute", and the negotiation of a new agreement to govern the future relations of the parties, or a "major dispute", are independent procedures under the Railway Labor Act. Irrespective of what an existing agreement may provide or how it may be interpreted by the Adjustment Board, either party is entitled to seek a new agreement to resolve the ambiguity or otherwise change the agreement so as to govern their future relations. This is the essence of the continuing process of collective bargaining provided by the Railway Labor Act. This court so recognized in the *Burley* case, *supra*, wherein it stated:

> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred *independently*

> *of the power to deal with grievances,* as a part of the power to contract concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement *settling for the future a dispute concerning the coverage or meaning of a pre-existing agreement.* For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place." (Emphasis supplied)

The petitioner would suspend collective bargaining for a new agreement pending an Adjustment Board decision on the existing agreement. The attempt to make one procedure dependent on the other is without reason or authority.

A national agreement does not prevent changes at the local level. Likewise, the submission by the carrier of a dispute to the National Railroad Adjustment Board does not prevent an organization representing its employees from progressing a Section 6 notice for changes in the agreement. The existence of the major dispute bars an injunction even though the carrier has filed a submission with the Adjustment Board. *Missouri-Illinois R. Co.* v. *Order of Railway Conductors,* 8 Cir., 322 F. 2d. 793; *Order of Railway Conductors and Brakemen* v. *Louisville & N. R. Co.,* 5 Cir., 331 F. 2d. 368.

The petitioner expresses approval of the dissenting opinion of the Court of Appeals which suggests that a Federal Court ought to declare the respondent's Section 6 notice invalid as a subterfuge. Aside from the complete misconception of the difference between collective bargaining for a new agreement and Adjustment Board procedure relative to the existing agree-

ment, the dissent would substitute judicial opinion and intervention in place of the expertize of the administrative agencies created by Congress. The identical Section 6 notice which the dissent would hold invalid as the "hands of Esau," has been ruled a proper Section 6 notice by the National Mediation Board. (See Appendix to this brief incorporating Defendants' Exhibits 1 and 2.)

The petition is to a considerable extent a mere quarrel with the opinion of the Court of Appeals regarding its view of the ultimate facts involved and the settled rules of law announced in the *Burley* case. Certiorari is usually not warranted in such cases because "their review would be of no importance save to the litigants themselves". *Rudolph* v. *United States,* 370 U.S. 269, 271.

CONCLUSION

Respondents submit that the petition does not disclose any sufficient reason for granting certiorari and further delay of settlement of an issue which has been long since settled on practically all other railroads in the United States. The writ should be denied.

Respectfully submitted,

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